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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARION SCOTT LEWIS, Defendant and Appellant.	E056942 (Super.Ct.No. RIF1200951) OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge. Affirmed.

Catherine White, under appointment by the Court of Appeal, for Plaintiff and Respondent.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Marion Scott Lewis appeals from his conviction of willful, deliberate and premeditated attempted murder (Pen. Code,[1] §§ 664, 187, subd. (a); count 1) and assault with a firearm (§ 245, subd. (a)(2); counts 2 and 3) with true findings on allegations of personal discharge of a firearm (§ 12022.53, subd. (c)) as to count 1, and personal use of a firearm (§ 12022.5, subd. (a)) as to counts 2 and 3.

Defendant contends the trial court's instruction on provocation, combined with the prosecutor's argument on provocation, erroneously informed the jury that it could not convict of attempted voluntary manslaughter unless it found sufficient provocation to cause a reasonable person to kill. Defendant argues, in the alternative, that his counsel provided ineffective assistance by failing to object. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

On the morning of November 15, 2011, Daryl Evans, defendant's cousin, and Evans's girlfriend, Sharlene Williams, went to defendant's house in Moreno Valley. Williams had previously borrowed food stamps from defendant and his girlfriend, Saleemah Turner. Williams and Evans were in the car arguing when Turner came outside and asked Williams for her money back. Williams said she had no money. Defendant also came outside and asked about the money. Evans was "cussing" at Williams because she had borrowed money from his cousin.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant said that Williams was "going to learn to stop bullshitting people today." Williams tried to start her car, but she was having problems with the starter. She testified that she did not remember seeing defendant with a gun. However, she told Deputy Tim Passalacqua that defendant went into the house, saying "'Fuck that bitch. I'm going to kill that bitch. She don't know who she's fucking with.'" Defendant returned with a .25-caliber handgun. He said, "oh this bitch is going to learn to quit bullshitting people today." He shot into the driver's side of Williams's car, and Evans said, "'Hold on, that almost hit me.'" The gun jammed, but defendant un-jammed it and fired two more times into the back window.

Defendant talked about going back into the house to get a shotgun. Williams got the car started and left. She did not then call the police.

Two days later, Turner called Williams and asked about the money. Williams said she was not going to pay the money back because her car window would cost more than $80 to fix. Williams hung up, and defendant and Turner called her back. Williams told Riverside Police Officer William Zackowski that the caller said "Bitch, I'm on my way over," and she was afraid because defendant had shot at her two days earlier.

Williams then called the police to report the shooting incident. When they arrived, Williams claimed she had received a call about an $80 loan, and she had told the caller she would not pay because the caller had shot out her car window. Williams identified defendant's photograph in a photographic lineup.

Deputy Passalacqua examined Williams's car and found a bullet hole in the rear passenger seat. The back windshield was shattered, and there was an apparent bullet

strike mark on the top part of the driver's side rear window. The deputy interviewed Williams on November 17, 2011, and a recording of the interview was played for the jury. The deputy did not observe any symptoms that indicated Williams was under the influence of marijuana or Xanax.

In the interview, Williams stated: "They were food stamps for one and as I'm telling them why would I tell you I'm going to pay you on the 15th and then I'm a pop up at your house before 10 o'clock why you acting like I'm dodging you? You know? I guess he felt stupid by the way I said it but I didn't yell at him, I didn't cuss at him, I didn't call him out of his name. He goes in the house and comes back out and starts cussing at me, 'oh this bitch is going to learn to quit bullshitting people today.' 'This bitch is going to learn to quit playing with people' so then he shoots the first one. That's when he takes three steps back and shoots at my car. I didn't realize he shot my car until my boyfriend was like 'hold on that almost hit me' and then he shot two more into my back window.'" She stated she had told Turner she would pay her back on November 20 after she got paid.

Williams testified she had been high on marijuana and Xanax when she spoke to the deputy. She testified she did not remember the events. The drugs had put her in a state in which she "[did]n't care about nothing."

Evans testified he did not remember going to defendant's house and getting shot at. He did not remember giving a statement to the police or to a defense investigator. He testified that he was taking Thorazine, Seroquel, and other medications for schizophrenia,

anxiety disorder, and "MNHR," which he explained stood for "[m]ental health and retardation." He testified he believed he was in mental health court.

Deputy Passalacqua testified that he had interviewed Evans, and a recording of the interview was played for the jury. In the interview, Evans had said that Williams "wasn't a threat to him—for once—she never posed a threat—she didn't raise her voice, she sittin' in the car like this here—he in the window yellin.' And I'm laughin'—I'm laughin' at him." Evans stated defendant fired the pistol because he was a "hothead."

Enrique Tira, a defense investigator, testified he had interviewed Williams and Evans. Neither Williams nor Evans showed any signs of being under the influence of narcotics, but Williams said she had been high on drugs on November 15. He inspected Williams's car, and he did not see any indication of a bullet strike or bullet hole. He did see three holes in the rear passenger seat, one of which appeared to be a burn mark. Williams told Tira that she had argued with Turner about $80 in food stamps that Williams owed Turner and a "larger argument" with Evans about her "doing anything with his family." Williams was arguing with Evans in the car when she heard a gunshot and the rear window shattered. She said Turner, defendant, and another man she did not know had been at the location. She told Tira she had not seen who shot the gun. After the rear windshield shattered, she started the car and drove away without looking back. She did not see anyone with a handgun that day. She told Tira that defendant's family had fixed her windshield.

Evans told Tira he got into an argument with Williams after he found out she owed money to Turner. Evans was seated in the passenger seat, and Williams was in the

driver's seat of her car. He said he had never heard any bullets striking the car. He said he did not want to be involved because "it was family." Evans said he never saw defendant with a gun that day.

The jury found defendant guilty of willful, deliberate and premeditated attempted murder (§§ 664, 187, subd. (a); count 1) and assault with a firearm (§ 245, subd. (a)(2); counts 2 and 3) and found true allegations of personal discharge of a firearm (§ 12022.53, subd. (c)) as to count 1 and personal use of a firearm (§ 12022.5, subd. (a)) as to counts 2 and 3.

The trial court sentenced defendant to seven years to life for count 1 with a consecutive enhancement of 20 years for the gun use as to that count, and a consecutive term of one year for count 2 with a consecutive enhancement of one year four months for the gun use as to that count. The trial court stayed defendant's sentence for count 3 under section 654.

III. DISCUSSION

A. Provocation Sufficient for Voluntary Manslaughter

Defendant contends the trial court's instruction on provocation, combined with the prosecutor's argument on provocation, erroneously informed the jury that it could not convict of attempted voluntary manslaughter unless it found sufficient provocation to cause a reasonable person to kill.

1. Additional Background

At the request of defense counsel, the trial court instructed the jury with CALCRIM No. 603 on attempted voluntary manslaughter under heat of passion. As

relevant to defendant's contentions on appeal, the instruction stated that to find defendant guilty of voluntary manslaughter, it must find that defendant intended to kill Williams; he "attempted the killing because he was provoked"; "[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment;" and "[t]he attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment." In addition, the jury "must decide whether the defendant was provoked and whether the provocation was sufficient," and "[i]n deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment."

The prosecutor argued to the jury: "There's nothing provoking the defendant that would reduce this from attempted murder to attempted voluntary manslaughter. It is simply not reasonable that you can be so upset over $80 in food stamps that you have to try to kill someone. [¶] That's what this started over, remember? How ridiculous. A debt over food stamps that goes for $40 on the street. It is an admittedly absurd reason to start shooting at someone. And I'm not up here telling you it made sense what he was doing. It didn't. But he definitely had no provocation, no reason that there was heat of passion in this moment that he was making the choice. Spur of the moment to start firing at her to kill her. That's absurd. This isn't an attempted voluntary manslaughter. It was sitting in the car, maybe talking, but she wasn't even yelling. The defendant's own cousin himself said that."

2. Analysis

Defendant argues the trial court's instruction to the jury that it must determine whether a reasonable person would have reacted from passion rather than from judgment would not have clarified for the jury whether it should focus on the defendant's conduct or on whether a reasonable person would have acted rashly, regardless of the actual reaction or its reasonableness. He argues the instruction given could erroneously have precluded the jury from convicting defendant of attempted voluntary manslaughter on a heat of passion theory unless it found the provocation would move a reasonable person to try to kill.

In *People v. Beltran* (2013) 56 Cal.4th 935 (*Beltran*), our Supreme Court reaffirmed that "when examining heat of passion in the context of manslaughter, the fundamental 'inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.' [Citation.] The proper standard focuses on whether the person of average disposition would be induced to react from passion and not from judgment." (*Id.* at pp. 938-939.) The court reviewed CALCRIM No. 570[2] in light of that standard and concluded that the instruction was not ambiguous

[2] CALCRIM No. 570 applies to actual voluntary manslaughter rather than attempted voluntary manslaughter. The instruction at issue in *Beltran* used the language, "'In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.'" (*Beltran*, *supra*, 56 Cal.4th at p. 954.) That

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as written. (*Beltran, supra,* at p. 957.) We agree. The instructions given to the jury in the instant case were likewise not ambiguous.

Moreover, as we discuss below, we conclude that any error in the instructions or in argument was harmless under any standard of review because no evidence supported an instruction on voluntary manslaughter. "If the evidence in a case does not support instructions on voluntary manslaughter, the definition of provocation and heat of passion as relevant to voluntary manslaughter are immaterial. [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 118.) "[T]he factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation." (*People v. Lee* (1999) 20 Cal.4th 47, 59.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*Ibid.*) "The test for adequate provocation is an objective one, however." (*Id.* at p. 60.)

Here, the purported provocation was that Williams had borrowed $80 in food stamps from defendant's girlfriend and had failed to pay it back. Even if Williams was "cussing back" about her failure to repay the loan, that was insufficient as a matter of law to constitute provocation. "[A] voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words, a

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language was replaced in 2008 with the language that now also appears in CALCRIM 603: "In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." (*Beltran, supra,* at p. 954, fn. 14.)

technical battery, or slight touching. [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826-827 [argument in which the defendant and the victim cussed back and forth during an argument "did not constitute sufficient provocation for voluntary manslaughter"].) (See also *People v. Lucas* (1997) 55 Cal.App.4th 721, 739 [evidence of name calling, smirking, staring, and giving dirty looks was insufficient to establish provocation]; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [holding that calling the defendant "a 'mother f—er' and . . . repeatedly asserting that if defendant had a weapon, he should take it out and use it . . . plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment"].)

B. Assistance of Counsel

Defendant argues, in the alternative, that his counsel provided ineffective assistance by failing to object to the prosecutor's argument concerning provocation.

"To prevail on a claim of ineffective assistance of counsel, the defendant must prove: (1) his or her attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) his or her attorney's deficient representation subjected him or her to prejudice. [Citations.] Prejudice means a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.] A reasonable probability means a 'probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Najera* (2006) 138 Cal.App.4th 212, 225.) Because, as discussed above, no evidence supported instructing the jury on provocation, it necessarily follows that the prosecutor's argument on the issue could not have prejudiced defendant.

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.